IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

No. 78-1656

INDEPENDENT STAVE COMPANY, DIVERSIFIED INDUSTRIES DIVISION,

v.

NATONAL LABOR RELATIONS BOARD

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Eighth Circuit

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April, 1979

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Citations

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NATONAL LABOR RELATIONS BOARD

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To the United States Court of Appeals for the Eighth Circuit

Independent Stave Company, Diversified Industries Division, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. A, infra, pp. 13-20 is reported at — F.2d —, 100 LRRM 2646. The decision and order of the Board (App. D, infra, pp. 26-43) are reported at 233 NLRB No. 179, 97 LRRM 1102.

JURISDICTION

The judgment of the court of appeals (App. B, infra, pp. 21-24) was entered on February 15, 1979, Petitioner's timely petition for rehearing *en banc* having been denied February 13, 1979 (App. C, infra, p. 25). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

Where the collective bargaining agreement between the Employer and International and Local Union provides that the processing of grievances and arbitrations shall be "solely handled by the Local Union" and the Employer in good faith believes the Local and International Union are violating said limitation clause, and the employer has filed actions in State and Federal Courts asserting those violations by the unions, and pending outcome of those cases requests the Local Union for written assurances that the International Union is not participating in the processing or handling of the grievance which the Local Union desires to arbitrate:

(1) Does the NLRB have jurisdiction to find the employer violated Section 8(a)(5) and (1) of the NLRA on the theory that the employer refused to comply with its obligation to arbitrate a grievance with the International Union and Local Union in breach of the collective bargaining agreement's arbitrate clause?

(2) Should the NLRB be permitted to decide the contract question previously raised by the employer's State and Federal Court actions, and to thereby potentially interfere with the jurisdiction of those courts under Section 301 of the NLRA?

STATUTES INVOLVED

The relevant provisions of the National Labor Relations Act (61 Stat. 136, 29 USC 151, et seq.) are as follows:

Sec. 8(a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

* * * * * * *

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a).

* * * * * * *

Sec. 301(a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act, or between any such labor organization, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

* * * * * * *

STATEMENT

Petitioner (the employer) is a Missouri corporation, which manufactures wooden products at Lebanon, Missouri (App. D, infra, pp. 31-37; NLRB complaint, par. 5). Petitioner's employees who worked in the wooden bowl factory were covered by a collective bargaining agreement with Coopers' International Union of North America, AFL-CIO (the International Union) and its Local Union No. 7 (Local 7 or the Local Union).

Under Article XX of the collective bargaining agreement (App. E, infra, pp. 44-47) entitled "Grievance and Arbitration", the final Section 3 ends with the provision: "The processing of grievances and arbitrations shall be solely handled by the Local

Union."[1] (App. E, infra, p. 47). Both the Employer and International Union representatives understood the quoted clause was inserted in the agreement at the Employer's request, because the Employer believed that the International Union had been guilty of using the grievance-arbitration processes for frivolous or petty cases and the Employer did not want to be obligated to arbitrate cases in which the International Union participated. (Tr. 120, 85, G.C. Exh. 13)[2] The agreement here involved was effective from November 4, 1974 to November 3, 1977. (G.C. Exh. 3, pp. 21-22)

When the Employer learned that the International Union had been participating in the processing and handling of grievances, or was about to do so, the Employer on August 27, 1976 instituted a declaratory judgment action in Laclede County, Missouri, Circuit Court at Lebanon, Mo., against Local 7 to obtain a judicial determination of whether the Local Union could force the Employer to process grievance and arbitration cases in which the International Union participated or assisted. (Tr. 68, Co.Exh. 3) On February 3, 1977, the Employer filed a complaint in the United States District Court for the Western District of Kentucky, at Louisville where the International maintains its offices, seeking injunctive relief and damages against the International Union for its breach of the agreement by its participation in the grievance-arbitration processes. (Tr. 68, Co. Exh. 2) Both of these actions were still pending at the time of the NLRB trial herein, and are still pending at the time of filing this Petition.

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[1] The decision by the Court of Appeals misquotes this sentence, and although this was called to that Court's attention by Petitioner's petition for rehearing *en banc*, it was not corrected. See App. A, infra, pp. 14, 18, 19.

[2] References to the transcript of the proceedings before the NLRB Administrative Law Judge are shown by numbers following "Tr.". References to exhibits in that proceeding are "G.C.Exh." for General Counsel of NLRB's Exhibits; "C.P. Exh." for exhibits of Charging Party (International Union and Local 7); "Co.Exh." for exhibits of employer.

On February 3, 1977, Local 7 representatives Coryell and Eaton met with Petitioner's representatives Boswell and Willhouse and selected an arbitrator to hear a grievance relating to the seniority of employee Virginia Gladden. (Tr. 40, line 19 to Tr. 42, line 4). Earlier Employer's President Boswell had requested Local 7 President Lundblade to give assurances that the limitation (against International Union participation in the processing or handling of grievances) contained in the last sentence of the arbitration clause was being observed. (Tr. 36-37).

Because he was not satisfied with Local 7's response to his requests for assurances, and because he believed Local 7 and the International Union had breached the agreement by the International Union's furnishing of an attorney from the offices of its General Counsel and paying for the expenses of the last arbitration case in September, 1976 (Tr. 36-37, 58, 65-66, 92), Employer's President Boswell wrote a letter on February 3, 1977, to the arbitrator selected on that date (G.C.Exh. 13) explaining that the arbitrator had been selected, setting out the background and purpose for the last sentence of the arbitration clause, and stating that the employer wanted the arbitration to be conducted "strictly to the letter of the contract." The letter then states:

> "To insure the arbitration is solely handled and financed by Local 7, I do not feel it is out of order to request those representing Local 7 and the officers of Local 7 to sign an affidavit stating the Coopers' International Union has not instructed, conferred, employed, paid or guaranteed payment, or in any direct or indirect way entered into the pursuit of this grievance. Also, that all of the work and expenses occurring from the grievance and arbitration is borne solely by Local 7."

It is undisputed that Employer's President Boswell was acting in good faith at all times involved in this case, and that there is no claim in this proceeding of any bad motivation on

his part. (Tr. 76, lines 14-16). Local 7 President Lundblade admitted that Boswell had told her he was merely wanting assurances that the unions were abiding by the arbitration agreement. (Tr. 63). It was so clear to the Administrative Law Judge that Petitioner's motives were not being attacked, that the Judge ruled that Petitioner could not fully cross-examine Local 7 President Lundblade (Tr. 62-63) or International Union President Higdon (Tr. 86-87) about their knowledge concerning Petitioner's motivation or the purpose of the language used in the arbitration clause. The Judge also refused to permit Petitioner to call as a witness its former attorney who had negotiated the language in question, to explain the purpose of the clause, and refused Petitioner's offer of proof as to the proffered testimony from that former Employer counsel. (Tr. 133-143).

Further correspondence between the parties and the arbitrator were received as G.C.Exhs. 14-21 (Tr. 44-45) and Charging Party Exhs. 6-11 (Tr. 46-47). As shown by C.P.Exh. 9, a letter from Employer's agent to the arbitrator dated April 22, 1977, the employer announced it was "ready to arbitrate the issue at hand at any time the union stands ready to sign an affidavit that they are not in violation of the Local agreement between Local 7 and Diversified Industries."

The NLRB Judge, the Board's form decision affirming the Judge, and the Eighth Circuit United States Court of Appeals have all found that Petitioner violated Section 8(a)(5) and (1) of the Act by making an attempted mid-term modification of the collective bargaining agreement to exclude the International Union from the grievance-arbitration processes, or from financing Local 7 grievance-arbitration cases. The Court of Appeals has thus permitted the NLRB Judge and the Board itself to assume jurisdiction over the union claims that the employer breached the collective bargaining agreement by refusing to arbitrate grievances as agreed. At the same time the Court of

Appeals has rejected the claimed contractual interpretation asserted by the employer, that Local 7 and the International Union are the parties who have breached the collective bargaining agreement. The Court of Appeals has failed to mention or discuss the potential effect of the NLRB decision which it enforces upon the earlier filed lawsuits instituted by the employer in Missouri State Court and in the United States District Court for the Western District of Kentucky.

Both the Board and Court of Appeals decisions attempt to support the conclusions reached adverse to the employer by reciting evidence as to grievance and arbitration cases in 1975 and 1976, despite the fact that the amended unfair labor practice charge alleges that the refusal to bargain alleged in this case occurred only on or about February 3, 1977, and despite the fact that the NLRB Judge refused to permit Employer's counsel to cross-examine any witnesses concerning the pre 1977 events because he concluded that only the events on and since February 3, 1977, were relevant. See App. F., infra, which is a copy of pp. 6-8 of Employer's Brief in Court of Appeals.

REASONS FOR GRANTING THE WRIT

The writ of certiorari should be granted to this case because the decision of the Court of Appeals involves an important question of federal labor law, and the decision reached by the Court of Appeals is in conflict with applicable decisions of the Supreme Court[3] and of other Courts of Appeals.[4] The decision by the Board which is enforced by the Court of Appeals is in conflict with earlier Board decisions holding it is not an unfair labor practice for an employer to refuse to arbitrate a grievance which the employer in good faith claims to be excluded from the arbitration clause,[5] or which the employer claims was not processed as required.[6] The Supreme Court should resolve the important questions of federal labor laws presented by this case, to settle and clarify the jurisdiction or lack of jurisdiction of the Board to find unfair labor practices for alleged breaches of agreements to arbitrate under collective bargaining agreements, and to assure that Congress' clearly expressed intention to exclude the NLRB from such functions,[7] is not overlooked in other cases, as it was in this case.

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[3] *Charles Dowd Box Co. v. Courtney*, 368 U.S. 502, 510, 513 (1962).

[4] *NLRB v. Los Angeles-Yuma Freight Lines*, 446 F.2d 210 (9th Cir. 1971); *Amalgamated Clothing Workers of America v. NLRB*, 343 F.2d 329, 331 (D.C. Cir. 1965).

[5] *Textron of Puerto Rico*, 107 NLRB 583 (1953); *United Telephone Co.*, 112 NLRB 779 (1955); *Pied Piper Shoe Corp.*, 172 NLRB No. 45 (1968); *National Dairy Products Co.*, 126 NLRB No. 62 (1960); *Central Rufina*, 161 NLRB No. 59 (1966).

[6] *Danner Press, Inc. v. NLRB*, 374 F.2d 230 (6th Cir. 1967).

[7] "Once the parties have made a collective bargaining contract, the enforcement of that contract should be left to the usual processes of the law and not to the National Labor Relations Board." H. R. Conf. Rep. No. 510, 89th Cong., 1st Sess., 42; I Legislative History of the Labor Management Relations Act 545-46 (1948). In contrast to the federal pre-emption of court jurisdiction in other respects, "Congress deliberately chose to leave the enforcement of collective

The authorities we have cited at notes 3-7 supra, uniformly recognize that Congress expressly decided against giving the National Labor Relations Board power to find unfair labor practices based upon breaches of collective bargaining agreements, and deliberately left the matter of contract enforcement to the Courts. Section 301 of the Act was a further indication of that Congressional choice. The Section 301 remedy extends to suits to compel arbitration of individual grievances, *Textile Workers v. Lincoln Mills*, 353 U.S. 448 (1957), and to specifically enforce an arbitrator's award, *United Steelworkers v. Enterprise Wheel and Car Corp.*, 363 U.S. 593 (1960). The availability of the Section 301 remedy, and the clear choice by Congress to exclude the NLRB from jurisdiction to enforce labor agreements, including agreements to arbitrate, is what has convinced the Ninth and D. C. Circuit to deny enforcement of NLRB decisions which have failed to exercise due caution to abstain from jurisdiction in cases of this sort where the Congressionally provided remedies under Section 301 have not been utilized. See cases at note 4, supra.

The decision in this case has failed to confine the NLRB to its properly restricted jurisdiction, but has permitted the NLRB decision to find an unfair labor practice by the mere alleged failure of the company to arbitrate a grievance which the Board found the company had agreed to arbitrate. The fact that the Court of Appeals has approved the NLRB decision does not remove the fact that the NLRB has flagrantly exceeded its jurisdiction in this case. The procedures of the NLRB trial are far different from that of the state and federal courts. Discovery is not allowed in the NLRB procedures, as in the courts. The courts are more expert at contract interpretation and enforcement than the NLRB Judges, who have never been given

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bargaining agreements 'to the usual processes of the law.'" *Charles Dowd Box Co.*, supra, 368 U.S. at 513. Those usual processes of the law include the concurrent jurisdiction of state and federal courts under Section 301, 29 USC 185.

power to entertain such actions, and thus have little or no experience. The standards for appellate review from court tried cases are different from the restrictive substantial evidence rule which is applicable to NLRB cases, as was the standard of review utilized by the Court of Appeals below. A far different result might have been reached by the Missouri State Court and the Western District of Kentucky United States District Court, as to the question of which side is guilty of breaching the collective bargaining agreement, and as to the proper interpretation of the limitation clause here involved.

The Court of Appeals erred in failing to notice or discuss these important matters of federal labor law, matters which go to the heart of the jurisdiction and power of the NLRB to even entertain the present case.

The Supreme Court cases cited by the Court of Appeals do not justify the NLRB's assumption of jurisdiction to find an unfair labor practice merely from an alleged breach of an agreement to arbitrate. *NLRB v. C & C Plywood*, 385 U.S. 421 (1967), was a case which did not involve an arbitration agreement, and there was no claim the employer had violated the collective bargaining agreement, as in this case is the crux of the claim on which Petitioner was found guilty. *NLRB v. Strong*, 393 U. S. 357, 360 (1969), involved an employer's refusal to execute a written collective bargaining agreement reached in negotiations. As a remedy for the violation found, the Board ordered the employer to sign the document and to pay the appropriate fringe benefits as provided in the contract as a form of back pay, a standard type of board remedy. In neither of those cases was there an NLRB order finding the employer violated the contract, as is the essential basis of the decision by the Board in the present case.

Allied Chemical & Alkali Workers v. P.P.G. Co., 404 U.S. 157, 183-188 (1971) ruled that retired workmen were not "employees" as meant by the Act and therefore an employer was

not guilty of a mid-term contract modification for having altered their benefits without bargaining with the union. Far from supporting the result below, that case strongly calls for review to be granted to reverse the decision.[8]

The decision below, if allowed to stand, will encourage the Board to intrude further into the area of contract enforcement, which Congress has not authorized. It will create the possibility of conflicting decisions of contract interpretation between the decision below and the decision which will be made by the Missouri Court and the Western District of Kentucky United States District Court. The International Union is already contending that the Western District of Kentucky has been ousted of jurisdiction by this NLRB decision, now enforced by the Eighth Circuit. Such results were never intended by Congress. In this one area of contract interpretation and enforcement the Courts were to be given the jurisdiction, not the NLRB. That mandate of Congress has been flagrantly disregarded by the decision below.

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[8] After noting the legislative history quoted at note 7, supra, Mr. Justice Brennan's opinion for the Court states: "The purpose of the proscription of unilateral mid-term modifications and terminations in § 8(d) cannot be, therefore, simply to assure adherence to contract terms. As far as unfair-labor practice remedies are concerned, that goal was to be achieved through other unfair-labor-practice provisions which were rejected in favor of customary judicial procedures. See *Dowd Box Co. v. Courtney*, 368 U.S. 502, 510-513 (1962)."

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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April, 1979

APPENDIX

APPENDIX A

United States Court of Appeals
For the Eighth Circuit

No. 78-1146

National Labor Relations Board, Petitioner, v. Independent Stave Company, Diversified Industries Division, Respondent.	On Application for Enforcement of an Order of the National Labor Relations Board.

Submitted: September 15, 1978
Filed: January 23, 1979

Before HEANEY and STEPHENSON, Circuit Judges, and HANSON,* Senior District Judge.

HEANEY, Circuit Judge.

The National Labor Relations Board petitions this Court for enforcement of its order against Independent Stave Company, Diversified Industries Division. The Board's decision and order are reported at 233 NLRB No. 179, 97 L.R.R.M. 1102

* WILLIAM C. HANSON, United States Senior District Judge for the Southern District of Iowa, sitting by designation.

(1977).[1] The critical issue is whether Diversified violated §8 (a)(1) and (5) of the National Labor Relations Act, 29 U.S.C. §158(a)(1) and (5), by insisting that Local Union No. 7, as a precondition to arbitrating certain grievances, sign an affidavit stating that its parent union, the Coopers International Union of North America, AFL-CIO, had not instructed, conferred, employed, paid or guaranteed payment or in any direct or indirect way entered into pursuit of grievances and further stating that all work and expense incurred in processing the grievances through arbitration was to be borne solely by Local No. 7.

In 1967, the International Union was certified by the Board as the collective bargaining representative of production and maintenance employees of Diversified's Lebanon, Missouri, plant. Thereafter, Diversified entered into three successive collective bargaining agreements with the International Union and Local No. 7. The latest agreement, effective from November 4, 1974, through November 3, 1977, contained a modified grievance and arbitration clause which provided, "The processing of grievances in arbitration shall be solely handled by the local union."[2]

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[1] For an earlier unfair labor practice case involving the Independent Stave Company and the Coopers' International Union, *see Independent Stave Company v. N.L.R.B.*, 352 F.2d 553 (8th Cir. 1965), *cert. denied*, 394 U.S. 962 (1966).

[2] It can be argued that this particular clause was not a mandatory subject of collective bargaining because it is repugnant to the purposes of the Act and unenforceable as it significantly limits the right of the International Union, the certified bargaining agent, to represent its members in the settlement of grievances. *See N.L.R.B. v. Wooster Div. of Borg-Warner Corp.*, 356 U.S. 342 (1958); *N.L.R.B. v. Signal Manufacturing Company*, 351 F.2d 471 (1st Cir. 1965), *cert. denied*, 382 U.S. 985 (1966); *National Labor Relations Board v. Kentucky Util. Co.*, 182 F.2d 810 (6th Cir. 1950); *AMF Incorporated-Union Machinery Division and Machinists Lodge 1738, AFL-CIO*, 219 NLRB No. 109, 90 L.R.R.M. 1271 (1975); *Lufkin Telephone Exchange, Inc.*, 191 NLRB No. 151, 77 L.R.R.M. 1488 (1971). In view of the fact that we affirm the Board's construction of the clause, we need not reach the issue of repugnancy. *See Racine Die Casting Co.*, 192 NLRB No. 73, 77 L.R.R.M. 1819 n.6 (1971).

In 1975, Local No. 7 filed eight grievances with Diversified. The company refused to arbitrate them saying that there was nothing to arbitrate. Local No. 7 then filed an action in District Court to compel arbitration. Thereafter, the parties executed a settlement agreement under which five of the grievances were to be arbitrated.

An arbitration on the first of the five grievances was held in August, 1976. Back pay was awarded to three of the employees as a result of the arbiter's decision. Local No. 7 was represented in the arbitration proceeding by an attorney employed by the law firm that served as General Counsel for the International. Attorneys fees were paid from a strike and defense fund established by the Constitution of the International Union. One-third of the dues and initiation fees of all members are paid into this fund. The minimum payment is $3.25 per month. The fund is used for strike benefits, arbitration costs and legal fees.

Diversified refused to proceed to arbitration on the two additional grievances or to pay the back pay award for the three employees on the ground that the International had violated the collective bargaining agreement by assisting the local in the processing of the grievances through arbitration.

Late in 1976, two additional grievances were filed. Diversified responded by mailing a letter to Local No. 7 in which it stated:

> To insure the arbitration is solely handled and financed by Local 7, I do not feel it is out of order to request those representing Local 7 and the officers of Local 7 to sign an affidavit stating the Coopers International Union has not instructed, conferred, employed, paid or guaranteed payment, or in any direct or indirect way entered into the pursuit of this grievance. Also, that all the work and expenses occurring from the grievance and arbitration is born [sic] solely by Local 7.

A copy of this letter was sent to the arbiter. He responded by proposing that he first consider whether the International Union and Local No. 7 had violated the section of the collective bargaining agreement with respect to handling of grievances and then to determine the merits of the grievance. The union agreed to this proposal but the company rejected it.

The International and the local then filed an unfair labor practice, charging that the company was violating § 8(a)(5) by conditioning its participation in the arbitration proceeding upon the submission of the affidavit described above. The Board found that the defense fund was separately maintained by the International Union for the use of the local unions involved and for the specific expenses enumerated above. It further found that when a local incurs an expense payable from the fund, the bill is sent to the International Union and checks drawn on the fund are signed by it. The Board concluded that the International was "not bearing the expense of legal or arbitration fees in the handling or processing of grievances." It held that "when [Diversified] demanded the assurances in an affidavit from Local 7 as a condition precedent to arbitration, it modified the contractual grievance procedure of the contract and effectively blocked Local 7 from utilizing the grievance procedure unless and until it waived its rights as a bargaining representative," and that the International "would be relinquishing its rights and obligations as a bargaining representative were it foreclosed as [Diversified] demanded." It further held that "Local 7 was free to consult or to confer with the International on the advisability of filing a grievance or how best to process a grievance, despite the language of the contractual provision. * * * To insist as a condition precedent to processing grievances that Local 7 submit an affidavit that it is not doing what it is permitted to do under the contract and under the statute is a unilateral and significant change in the grievance procedure provisions of the contract." It finally held that "by insisting

upon the affidavit from Local 7 * * * [Diversified] unilaterally created a condition to the future processing of grievances which effectively amounted to a unilateral modification of the contract in mid-term in violation of Sections 8(d) and 8(a)(5) of the Act."

The Board ordered Diversified to post appropriate notices, to withdraw its insistence that the representatives of Local No. 7 sign the affidavit previously referred to as a condition precedent to processing of grievances and that the International Union attest to the fact that Local No. 7 has received no assistance whatsoever in the handling or processing of grievances, to cease interfering with its employees in the exercise of their rights under § 7 of the Act and to bargain in good faith with the local and International Unions.

Section 8(a)(5) of the Act makes it an unfair labor practice for an employer to refuse to bargain collectively with the representative of his employees. An employer violates § 8(a)(5) of the Act when it makes a mid-term change in any provision of the collective bargaining agreement relating to a mandatory subject of bargaining. *Allied Chemical & Alkali Workers v. P.P.G. Co.*, 404 U.S. 157, 183-188 (1971); *N.L.R.B. v. Huttig Sash & Door Co.*, 377 F.2d 964, 967 (8th Cir. 1967). A grievance-arbitration procedure is a term or condition of employment and a mandatory subject of bargaining within the meaning of § 8(a)(5). *Taft Broadcasting Co., WDAF AM-FM-TV v. N.L.R.B.*, 441 F.2d 1382 (8th Cir. 1971).

It follows that Diversified violated § 8(a)(1) and (5) of the Act if it made a unilateral mid-term change in the collective bargaining agreement. The Board's finding that it made such a change by refusing to arbitrate unless the disputed affidavit was signed is supported by substantial evidence on the record as a whole.

The clause is quite clear. It simply provides that grievances submitted to arbitration "shall be solely handled by the local union." It does not prohibit the local from being advised or counseled by the International Union with respect to handling grievances in arbitration. It does not prohibit the International Union from advising the local as to the merits of grievances, it does not specifically prohibit the local from employing counsel to assist it in preparing and submitting grievances to arbitration, and it does not specifically bar the International Union from contributing to the expense incurred in processing grievances through arbitration.

Diversified's principal argument is that the parties intended that the clause be interpreted to prohibit the International Union from paying the expenses of arbitration, and that it did pay such expenses with respect to the grievances in question. The Administrative Law Judge and the Board avoided this issue by holding that the payments were made from the defense fund and that the defense fund was not a fund of the International Union but was a fund held by the International Union for the benefit of the local unions and their members. This holding has substantial support in the record.

The defense fund is provided for in the Constitution of the International Union.[3] The Constitution provides in substance

[3] Article XXIX of the Constitution provides as follows:

Section 1. Each Local Union shall pay through its Financial-Secretary-Treasurer monthly on all members in good standing to the International President, Secretary-Treasurer a sum of not less than one (1) hours pay plus twenty-five (25 cents) at the lowest rate found in the respective Contracts or a minimum of three dollars and a quarter ($3.25) per month per member, which ever is the greater. * * * Said funds shall be deposited in the Amalgamated Strike, Defense and Organizing Fund.

* * *

Section 3. The above mentioned Fund shall be under the exclusive control of the General Executive Board and shall be appropriated for strikes, defense of the Local Unions and organizing.

that each local is to pay approximately one-third of the dues collected from each member to the defense fund and one-third to the International Union's general operating fund. Each local is permitted to retain the balance of the dues collected for its own purposes. Payments from the defense fund to the locals are made by the president of the International Union upon the approval of the executive board. The president of the International Union testified that it is the policy of the board to approve for payment all bills submitted by local unions for legal fees and arbitration expenses. He further testified that the International Union had not made any contributions to the local union for the purpose of processing Diversified's grievances other than those made from the defense fund, and that the International Union had not otherwise participated in the handling and processing of the grievances for this local union since the 1974 agreement had been signed. The testimony of the president of the International Union was not contradicted.

If we were to adopt the position urged by Diversified, we would be required to hold that the International and local unions had waived the right of their members to have monies contributed to the defense fund used in arbitration proceedings. We are unwilling to so hold without clear and convincing evidence of such waiver. No such evidence is present here. Moreover, the clause requiring the local union to solely handle the processing of grievances submitted to arbitration must be strictly construed since it tends to limit the statutory right of the employees to be represented by the International Union, the certified bargaining agent. When so construed, it does not bar the financial assistance provided to the local from the defense fund.

We find no merit in Diversified's contention that a company's breach of an agreement to arbitrate is not a matter for the National Labor Relations Board but is for the courts.

Here, the unions agreed to permit the arbiter to decide precisely what was meant by the disputed words and the employer refused. Moreover, it is clear that the Board has the power to interpret collective bargaining agreements pursuant to the enforcement of statutory rights. *N.L.R.B. v. C & C Plywood Corp.*, 385 U.S. 421, 424-430 (1967); *N.L.R.B. v. Huttig Sash & Door Co., supra* at 968-970. Similarly, under § 10(a) of the Act, the Board may "proscribe conduct which is an unfair labor practice even though it is also a breach of contract remediable as such by arbitration and in the courts." *N.L.R.B. v. Strong*, 393 U.S. 357, 361 (1969).

We do feel that the Board's order is broader than it should be. There is no substantial evidence in the record indicating that Diversified has refused to bargain in good faith on any issues other than those relating to the processing of grievances through arbitration.

We enforce the Board's order as written, with the exception of paragraph 2(a).[4] That section shall be deleted from the order and from the notice to the employees.

The Board's order is enforced as modified.
Costs will be taxed to Diversified.
A true copy.
Attest:
Clerk, U. S. Court of Appeals, Eighth Circuit

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[4] Paragraph 2(a) of the order provides as follows:

Respondent, Independent Stave Company, Diversified Industries Division, its officers, agents successors and assigns, shall:

* * *

2. Take the following affirmative action, which is deemed necessary to effectuate the policies of the Act.

(a) Bargain in good faith, upon request, with Coopers' International Union of North America, AFL-CIO and its Local Union No. 7, as the exclusive representative of the employees in the aforesaid appropriate unit, concerning wages, hours, and other terms or conditions of employment, and embody in a signed agreement any understanding reached.

APPENDIX B

United States Court of Appeals
For the Eighth Circuit

National Labor Relations Board,
Petitioner,
v.
Independent Stave Company, Diversified Industries Division,
Respondent.
No. 78-1146

JUDGMENT

Before: HEANEY and STEPHENSON, Circuit Judges, and HANSON,* Senior District Judge

THIS CAUSE came on to be heard upon the application of the National Labor Relations Board for the enforcement of a certain order issued by it against the Respondent, Independent Stave Company, Diversified Industries Division, Lebanon, Missouri, its officers, agents, successors, and assigns on December 13, 1977. The Court heard argument of respective counsel on September 15, 1978, and has considered the briefs and transcript of record filed in this cause. On January 23, 1979, the Court, being fully advised of the premises, handed down its decision granting enforcement of the Board's order, as modified. In conformity therewith, it is hereby

ORDERED AND ADJUDGED by the Court that Respondent, Independent Stave Company, Diversified Industries Division, Lebanon, Missouri, its officers, agents, successors, and assigns, shall:

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* William C. Hanson, United States Senior District Judge for the Southern District of Iowa, sitting by designation.

1. Cease and desist from:

(a) Refusing to bargain collectively with Coopers' International Union of North America, AFL-CIO and its Local Union No. 7, as the exclusive bargaining representative of the employees in the appropriate unit, by unilaterally modifying the terms of any collective-bargaining agreement entered into with the bargaining representative of its employees.

(b) In any like or related manner, interfering with, restraining, or coercing employees in the exercise of their rights under Section 7 of the National Labor Relations Act (hereinafter called the Act).

2. Take the following affirmative action, which the Board has found necessary to effectuate the policies of the Act.

(a) Withdraw its insistence as a condition precedent to the processing of grievance that Local 7 or the International attest, aver or otherwise confirm that Local 7 has received no assistance whatsoever from the International in the processing or handling of grievances.

(b) Post at its place of business in Lebanon, Missouri, copies of the attached notice marked "Appendix." Copies of said notice, on forms provided by the Regional Director for Region 17 of the National Labor Relations Board (Kansas City, Kansas) after being duly signed by Respondent's representative, shall be posted by it immediately upon receipt thereof, and shall be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced or covered by any other material.

(d) Notify the aforesaid Regional Director in writing, within 20 days from the date of this Judgment, what steps Respondent has taken to comply herewith.

Costs taxed in favor of Labor Board:	
Costs of record and brief:	$71.70
Total costs of Labor Board for recovery from Independent Stave Co., etc.:	$71.70

DATED: February 15, 1979

A true copy.

Attest:

/s/ ROBERT C. TUCKER
Clerk, U. S. Court of Appeals,
8th Circuit

March 16, 1979

(Seal)

APPENDIX

Notice to Employees

POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER, AS MODIFIED, OF THE NATIONAL LABOR RELATIONS BOARD

An Agency of the United States Government

WE WILL NOT unilaterally modify during its effective term any collective-bargaining contract entered into between us

and the representative of our employees, nor will we refuse to abide by the terms or conditions of the contract.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of their rights guaranteed by Section 7 of the Act.

WE WILL withdraw our insistence as a condition precedent to processing of grievances that Local Union No. 7 or the International attest, aver, or otherwise confirm that Local Union No. 7 received no assistance whatsoever from the International in the processing or handling of grievances.

INDEPENDENT STAVE COMPANY,
DIVERSIFIED INDUSTRIES DIVISION
(Employer)

Dated ..... By .....
(Representative) (Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, 616 Two Gateway Center, Fourth at State, Kansas City, Kansas 66101, Telephone 816-374-4588.

APPENDIX C

United States Court of Appeals
For the Eighth Circuit

No. 78-1146 September Term, 1978

National Labor Relations Board, Petitioner, vs. Independent Stave Company, Diversified Industries Division, Respondent.	Application for Enforcement of Order of the National Labor Relations Board

The Court having considered Petition for Rehearing En Banc filed by counsel for respondent and, being fully advised in the premises, it is ordered that the Petition for Rehearing En Banc be, and it is hereby denied.

Considering the Petition for Rehearing En Banc as a Petition for Rehearing, it is ordered that the Petition for Rehearing also be, and it is hereby, denied.

February 13, 1979

APPENDIX D

233 NLRB No. 179

United States of America
Before the National Labor Relations Board

Independent Stave Company,
Diversified Industries Division
and
Coopers' International Union of
North America, AFL-CIO and Its
Local Union No. 7

Case 17-CA-7512

DECISION AND ORDER

On September 28, 1977, Administrative Law Judge Bernard Ness issued the attached Decision in this proceeding. Thereafter, Respondent and Charging Party filed exceptions and supporting briefs.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings,[1] and conclusions of the Administrative Law Judge and to adopt his recommended Order.

[1] Both Respondent and Charging Party have excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an Administrative Law Judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (C.A. 3, 1951). We have carefully examined the record and find no basis for reversing his findings.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the Respondent, Independent Stave Company, Diversified Industries Division, Lebanon, Missouri, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order except that the attached notice is substituted for that of the Administrative Law Judge.[2]

Dated, Washington, D.C. December 13, 1977.

JOHN H. FANNING
Chairman

JOHN A. PENELLO
Member

JOHN C. TRUESDALE
Member

(Seal) National Labor Relations Board

[2] The Administrative Law Judge failed to conform his notice to his recommended Order. Therefore we will substitute the attached notice to remedy that inadvertent omission.

APPENDIX

Notice to Employees

Posted by Order of the
National Labor Relations Board

An Agency of the United States Government

WE WILL NOT unilaterally modify during its effective term any collective-bargaining contract entered into between us and the representative of our employees, nor will we refuse to abide by the terms or conditions of the contract.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of their rights guaranteed by Section 7 of the Act.

WE WILL bargain collectively, on request, with Coopers' International Union of North America, AFL-CIO and its Local Union No. 7, as the exclusive representative of all our employees in the appropriate unit described below, with respect to wages, hours, and other terms or conditions of employment, and embody in a signed agreement any understanding reached. The appropriate unit is:

> All production, maintenance and machinists employees at the Lebanon, Missouri, plant, including quality control inspectors and shipping department employees, but excluding office clerical employees, retail store employees, and professional employees, guards and supervisors as defined in the Act.

WE WILL withdraw our insistence as a condition precedent to processing of grievances that Local Union No. 7 or the International attest, aver, or otherwise confirm that Local Union No. 7 received no assistance whatsoever from the International in the processing or handling of grievances.

INDEPENDENT STAVE COMPANY,
DIVERSIFIED INDUSTRIES DIVISION
(Employer)

Dated ..... By .....
(Representative) (Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, 616 Two Gateway Center, Fourth at State, Kansas City, Kansas 66101, Telephone 816-374-4588.

United States of America
Before the National Labor Relations Board
Division of Judges

Independent Stave Company,
Diversified Industries Division

and Case 17-CA-7512

Coopers' International Union of
North America, AFL-CIO and
Its Local Union No. 7

Richard C. Auslander, Esq.,
for the General Counsel.

J. F. Souders, Esq. (Gruenberg,
Souders & Levine), St. Louis. MO,
for the Charging Party.

Donald W. Jones. Esq. (Prewitt, Jones & Karchmer), Springfield, MO, for the Respondent.

DECISION

Statement of the Case

BERNARD NESS, Administrative Law Judge: Upon a charge filed by Coopers' International Union of North America, AFL-CIO and its Local Union No. 7, hereinafter referred to as the International and Local 7, respectively, and jointly as the Charging Party, on February 14, 1977, and amended on April 11, 1977, a complaint dated April 12, 1977, was issued against Independent Stave Company, Diversified Industries Division, hereinafter referred to as the Respondent. The complaint alleged that Respondent violated Section 8(a)(1) of the Act by threatening employees with plant closure and discriminatory recall and that Respondent violated Section 8(a) (1) and (5) by repudiating the collective-bargaining agreement by refusing to arbitrate any grievance until an affidavit was given. In its answer, Respondent denied the commission of any unfair labor practices. Hearing was held before me on June 24, 1977, at Kansas City, Kansas. Upon the entire rec-

ord,[1] including my observation of the witnesses, and after due consideration of the briefs filed by the General Counsel, Charging Party and the Respondent, I make the following:[2]

Findings of Fact

I. Jurisdiction

Respondent, Independent Stave Company, Diversified Industries Division, is a corporation engaged in the manufacture and

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[1] The Respondent's unopposed motion to correct the transcript is granted in the following particulars:

Page	Line	From	To
9	16	that in representation for the counsel for General Counsel.	and representation by the counsel for General Counsel
10	4	state	stage
50	16	out	our
68	17-18	but I thinks its' intended, is it not.	but I think that is what is intended to be said.
79	18-19	Insert immediately after "your Honor, yes, I think I am" the following: Judge Ness: Off the record (Recess) Judge Ness: On the record Mr. Auslander: I've given some thought—	
85	16	attributal	attributable
85	18	agrivated	aggravated
90	5	contract was in evidence	contract that is in evidence

[2] The Respondent filed a post-hearing motion for an order dismissing complaint or alternatively for an order requiring copies of exhibits to be provided by the General Counsel. That motion is hereby denied. There is no showing by Respondent that it has been hampered or prejudiced in any material manner in the preparation of its brief because of not having been furnished copies of the exhibits. Further, General Counsel was under no obligation to provide the exhibits requested, said exhibits having been introduced at the hearing by Respondent and/or the Charging Party. The July 13, 1977 letter from Respondent's counsel to the General Counsel was in the nature of a request and not a demand for the exhibits. Finally, General Counsel has now provided Respondent with the exhibits.

wholesale distribution of barrels with principal offices in Lebanon, Missouri. In the course and conduct of its business operations, the Respondent annually sells products valued in excess of $50,000 directly to customers outside the State of Missouri. Based on the foregoing, and as agreed to by the parties, I find that Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. **The Labor Organization Involved**

The complaint alleges, the answer admits, and I find that Coopers' International Union of North America, AFL-CIO, and its Local Union No. 7 are labor organizations within the meaning of Section 2(5) of the Act.

III. The Unfair Labor Practices

A. **The Refusal to Bargain**

The International was certified in 1967 as the collective bargaining representative of the employees at Respondent's Lebanon, Missouri plant, in the unit described as follows:

> All production, maintenance and machinists employees of Respondent, including quality control inspectors and shipping department employees, but excluding office clerical employees, retail store employees, and professional employees, guards and supervisors, as defined in the Act.[3]

Three collective-bargaining contracts have been consummated since the Board certification. Each has been of 3 years duration and each has included Local 7 as a party to the contract, as well as the International. The current contract is effective from November 4, 1974 through November 3, 1977.

[3] Case 17-RC-5443.

The current contract includes in the Grievance and Arbitration provision (Article XX), the following sentence: "The processing of grievances and arbitrations shall be solely handled by the Local Union." (Section 3). This particular sentence was not included in the prior contracts and has given rise to the instant proceeding. The Respondent has refused to agree to arbitrate grievances until it first receives an affidavit from Local 7 giving assurances in the manner more fully described below that the International has not assisted the Local in the grievances involved.

In 1975, eight grievances were filed to which Respondent's president, J. E. Boswell responded there was no basis for the grievances nor was there anything basic to arbitrate. The Charging Party thereafter filed an action in U.S. District Court of Missouri, Southern Division, to compel arbitration of the grievances. The parties thereafter reached an agreement whereby, *inter alia*, five of the grievances were to go to arbitration. One was processed through arbitration.[4] Local 7's president, Jean Lundblade, thereafter continued to press Boswell for selection of an arbitrator on two of the other grievances.[5] By letter dated September 23, 1976, Boswell stated, "The matter is in litigation for the court to decide." Thereafter, the Charging Party, on January 4, 1977, again amended its complaint in the U.S. District Court, renewing its request to arbitrate the two grievances and for enforcement of the arbitrator's award in the one grievance which had been arbitrated. On August 27, 1976, the Respondent filed a petition for a declaratory judgment in the Laclede County, Missouri, Circuit Court, regarding the question whether the International could furnish aid and assistance to Local 7 under the contract. In February, 1977, the Respondent filed an action in U.S. District Court, Western District of Kentucky at Louisville, seeking an injunc-

[4] Arbitrator Vickery ordered backpay to three employees.

[5] The remaining two were dropped by Local 7.

tion against the International from participating in processing of grievances in violation of the contract.

In the latter part of 1976, two additional grievances were filed concerning employees Riley and Gladden. In late December, Lundblade met with Plant Manager Dillard and Assistant Production Manager Kirby Hertel to discuss the grievances. They were not resolved. By letter dated January 12, 1977, Boswell informed Lundblade he denied the Gladden grievance and said he was ready to go to arbitration if she desired. By letter dated January 15, Lundblade informed Boswell she was ready to meet with him to select arbitrators for the Riley and Gladden grievances. They met on Februaury 3 and Raymond Roberts was selected as the arbitrator. On this same date Boswell wrote to Roberts. The letter contained the demand which formed the basis for the unfair labor practice alleged in this proceeding. In pertinent part, the letter reads:

> Background for this letter is as follows: A few years back, Diversified Industries Division suffered severe financial losses, whcih were primarily attributable to lack of employee discipline brought about by layer upon layer of petty grievances aggravated and financed by the Coopers' International Union with whom Local 7 is affiliated. Hoping the cause would be corrected, a condition of the company signing the current contract was the matter of grievances and arbitrations be solely handled by the local union. This is stated in the last sentence of Section 3, Page 15, which states, "The processing of grievances and arbitrations shall be solely handled by the Local Union." We have proof that both the Local 7 and the Coopers' International Union have violated that part of the current contract by using the law firm of Gruenberg and Souders in St. Louis. Suits are pending against Local 7 and the Coopers' International Union seeking relief and damages caused by their violating of that part of the contract.

> We want the arbitration you will conduct to be strictly to the lttter of the contract. To insure the arbitration is solely handled and financed by Local 7, I do not feel it is out of order to request those representing Local 7 and the officers of Local 7 to sign an affidavit stating the Coopers' International Union has not instructed, conferred, employed, paid or guaranteed payment, or in any direct or indirect way entered into the pursuit of this grievance. Also, that all the work and expenses occurring from the grievance and arbitration is born (sic) solely by Local 7.

Souders, as counsel for Local 7, advised the arbitrator and the Respondent that Local 7 was prepared to meet the Respondent's "defense" to the grievance as part of the arbitration hearing. The arbitrator proposed to the parties a two-stage hearing, the first step being the issue of arbitrability, including the issue of any conditions precedent for the grievance to be heard on the merits. Respondent rejected the arbitrator's proposal and continued to demand the affidavit before it would agree to arbitrate the grievances.

Discussion

The General Counsel contends the Respondent has repudiated the contract in violation of Section 8(a)(5) of the Act by requiring that Local 7 submit an affidavit as a condition precedent to arbitration. He argues that the condition set by the Respondent constitutes a unilateral mid-term modification of the contract. The Charging Party contends that the record establishes that Local 7 indeed has complied with the section of the contract in dispute and that the processing of grievances has been handled solely by Local 7. He argues further that the Respondent cannot unilaterally add conditions precedent to processing arbitrations. The Respondent contends that because it has in good faith believed the International was violating the clause, it had a right to seek to enforce the limitation clause of

the agreement. He argues that a question is involved of contract interpretation or enforcement and that it is for the courts to deal with such issues. The Respondent further contends that even if the Board were to interpret the clause in question, the evidence establishes that the International and Local 7 have breached this clause and sought to coerce the Respondent to arbitrate cases in a manner other than as expressly agreed upon under the limitation clause referred to.

The record shows that the Respondent may have believed the International was involved in the processing or handling of grievances because a member of Souder's law firm represented Local 7 in one of the earlier arbitration cases. Souders is General Counsel for the International. But, as he testified, his firm also represents several of the locals of this same International.[6] In any event, the record shows that when the firm represents a local, the legal fees are paid from what is termed the "defense fund." The revenues for this fund are derived from monies paid into it by amalgamated locals.[7] The fund is separately maintained by the International for the use of the locals involved and for specific expenses, e.g., legal fees, arbitration costs, strike benefits. When a local incurs an expense payable from the fund, the bill is sent to the International and checks are then signed by the International covering the expense incurred. Such checks are drawn from the fund. It is thus clear that the International is not bearing the expense of legal or arbitration fees in the handling or processing of grievances. Souders, himself, testified that the law firm was paid from the defense fund for representing Local 7 in the Vickery arbitration case.

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[6] Such practice is not uncommon.

[7] Local 7, a participant, has about 44 members.

To repeat, the contractual provision in the contract reads as follows: "The processing of grievances and arbitrations shall be solely handled by the Local Union." In my view the language is clear and unambiguous. I am also convinced that when the Respondent demanded the assurances in an affidavit from Local 7 as a condition precedent to arbitration, it modified the contractual grievance procedure of the contract and effectively blocked Local 7 from utilizing the grievance procedure unless and until it waived its rights as a bargaining representative. Indeed, the International as well would be relinquishing its rights and obligations as a bargaining representative were it foreclosed as the Respondent demanded. The International and Local 7 were both parties to the contract as the bargaining representative of the bargaining unit employees. Without a doubt, Local 7 was free to consult or to confer with the International on the advisability of filing a grievance or how best to process a grievance, despite the language of the contractual provision. This would be equally true even if the International were not a party to the contract, which it was. To insist as a condition precedent to processing grievances that Local 7 submit an affidavit that it is not doing what it is permitted to do under the contract and under the statute is a unilateral and significant change in the grievance procedure provisions of the contract.

I find that by insisting upon the affidavit from Local 7 as set forth in its February 3, 1977 letter, the Respondent unilaterally created a condition to the future processing of grievances which effectively amounted to a unilateral modification of the contract in mid-term in violation of Sections 8(d) and 8(a)(5) of the Act.

Contrary to the Respondent's contention that the Respondent's conduct may have at best constituted a breach of contract, the law is settled that where conduct is of a kind condemned by the Act, it is not ruled out as an unfair labor practice simply because it also happens to be a breach of contract. The

Board has the power to proscribe conduct which is an unfair labor practice even though it is also a breach of contract remediable as such by arbitration and in the Courts.[8]

B. The Alleged Threat of Plant Closure and Discriminatory Recall

The complaint alleged that Respondent, through Connie Dillard, its production manager and admitted supervisor, threatened employees on February 18, 1977, with plant closure and discriminatory recall because of their union sympathies.

Carolyn Eaton, a sander for the past 5 years, was called as a witness for the General Counsel in support of this allegation. She testified that the Respondent has been having difficulties with production and on February 18, Dillard told her she could not understand why Eaton was having trouble with her production and that Gladys Bailey, who worked nearby also as a sander, did not seem to experience any problems in meeting production requirements. Eaton responded she was having headaches and had a nosebleed. According to Eaton, Dillard then said that if union members did not quit griping and complaining, she would close the plant down and would then rehire only nonunion employees, that all union members did was gripe and complain and cause trouble in the working area.

Dillard had been production manager since March, 1975, and had at one time been Local 7's president. She recalled having a conversation with Eaton about production. Her version of the conversation is substantially different. She testified that Eaton constantly complained about the quality of the bowls she had to sand. She told Eaton the bowls were not that bad and

[8] *N.L.R.B. v. Joseph Strong, d/b/a Strong Roofing and Insulating Co.*, 393 U.S. 357 (1969); *N.L.R.B. v. C & C Plywood Corporation*, 385 U.S. 421 (1967).

that Bailey managed to meet her quota and Eaton should be able to do the same. Dillard further told her that if the Respondent could not produce its goal of bowls, it might as well shut down. She denied even mentioning the word "union" or getting rid of members.

I credit Dillard's account of the conversation. Gladys Bailey was at the time, of the hearing, Local 7's vice-president and, according to the testimony, was present during the conversation between Dillard and Eaton. She was not called as a witness to corroborate Eaton's testimony. It is hardly likely that Dillard would make the statement attributed to her in the presence of Bailey. Moreover, it is improbable that Dillard would speak well of Bailey's production and in the next breath speak of getting rid of all the Union members because they were affecting production with their gripes. This would have included Bailey, as well as all the other Union members. It should be noted, too, that the contract contained a union-security contract whereby all the employees would have been members. I find that the credited testimony does not support this allegation of the complaint and is accordingly dismissed.

Conclusions of Law

1. All production, maintenance and machinists employees of Respondent at its Lebanon, Missouri, plant, including quality control inspectors and shipping department employees, but excluding office clerical employees, retail store employees, and professional employees, guards and supervisors, as defined in the Act, constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act.

2. At all times material herein, Coopers' International Union of North America, AFL-CIO and its Local Union No. 7, have been, and are now, the exclusive representative of the employees in the aforesaid unit for the purpose of collective bargaining within the meaning of Section 9(a) of the Act.

3. By refusing to bargain by unilaterally modifying the collective-bargaining agreement in derogation of its bargaining obligation under Section 8(d) of the Act, as above found, the Respondent has engaged in, and is engaging in, unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act.

4. The aforesaid unfair labor practices are unfair labor practices within the meaning of Section 2(6) and (7) of the Act.

5. Except for the foregoing, the Respondent has committed no other unfair labor practices under the Act.

The Remedy

Having found that the Respondent has engaged in certain unfair labor practices, I will recommend that it be ordered to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

Upon the foregoing findings of fact and conclusions of law, and upon the entire record, and pursuant to Section 10(c) of the Act, I hereby issued the following recommended:[9]

ORDER

Respondent, Independent Stave Company, Diversified Industries Division, its officers, agents successors and assigns, shall:

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[9] In the event no exceptions are filed as provided by Section 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Section 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

1. Cease and desist from:

(a) Refusing to bargain collectively with Coopers' International Union of North America, AFL-CIO and its Local Union No. 7, as the exclusive bargaining representative of the employees in the aforesaid appropriate unit, by unilaterally modifying the terms of any collective-bargaining agreement entered into with the bargaining representative of its employees.

(b) In any like or related manner, interfering with, restraining, or coercing employees in the exercise of their rights under Section 7 of the Act.

2. Take the following affirmative action, which is deemed necessary to effectuate the policies of the Act.

(a) Bargain in good faith, upon request, with Coopers' International Union of North America, AFL-CIO and its Local Union No. 7, as the exclusive representative of the employees in the aforesaid appropriate unit, concerning wages, hours, and other terms or conditions of employment, and embody in a signed agreement any understanding reached.

(b) Withdraw its insistence as a condition precedent to the processing of grievance that Local 7 or the International attest, aver or otherwise confirm that Local 7 has received no assistance whatsoever from the International in the processing or handling of grievances.

(c) Post at its place of business in Lebanon, Missouri, copies of the attached notice marked "Appendix."[10] Copies of said notice, on forms provided by the Regional Director for

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[10] In the event that the Board's Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall be changed to read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

Region 17, after being duly signed by Respondent's representative, shall be posted by it immediately upon receipt thereof, and shall be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced or covered by any other material.

(d) Notify the Regional Director for Region 17, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

Dated, Washington, D.C. September 28, 1977

/s/ BERNARD NESS
Administrative Law Judge

APPENDIX

Notice to Employees

Posted by Order of the National Labor Relations Board
An Agency of the United States Government

WE WILL bargain collectively, on request, with COOPERS' INTERNATIONAL UNION OF NORTH AMERICA, AFL-CIO and its LOCAL UNION NO. 7, as the exclusive representative of all our employees in the appropriate unit described below, with respect to wages, hours, and other terms or conditions of employment, and embody in a signed agreement any understanding reached.

The appropriate unit is:

All production, maintenance and machinists employees at the Lebanon, Missouri, plant, including quality control, inspectors and shipping department employees, but excluding office clerical employees, retail store employees, and professional employees, guards and supervisors as defined in the Act.

WE WILL NOT unilaterally modify during its effective term any collective-bargaining contract entered into between us and the representative of our employees, nor will we refuse to abide by the terms or conditions of the contract.
WE WILL withdraw our insistence as a condition precedent to processing of grievances that Local 7 or the International attest, aver or otherwise confirm that Local 7 received no assistance whatsoever from the International in the processing or handling of grievances.

INDEPENDENT STAVE COMPANY,
DIVERSIFIED INDUSTRIES DIVISION
(Employer)

Dated ..... By .....
(Representative) (Title)

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, 616—Two Gateway Center, Fourth at State, Kansas City, Kansas 66101 (Tel. No. 816—374-4588).

APPENDIX E

Article XX of Collective Bargaining Agreement

ARTICLE XX

Grievance and Arbitration

Section 1. For the purpose of this Agreement, the term "grievance" means any dispute which arises between the parties as to the application or interpretation of the Contract. There shall be no policy grievances, and any action of the Company carried out under its "management rights" shall be considered a matter of policy.

Step 1

Presentation of the Grievance to the Foreman

Within two (2) working days following the occurrence giving rise to the grievance any employee having such a grievance shall first attempt to adjust the matter with his foreman. Grievances presented beyond the time limitations stated herein shall not be considered or processed. The foreman shall give his answer to the employee involved as quickly as possible, but not beyond five (5) working days after its presentation.

Step 2

Appeal to the Plant Superintendent

If no satisfactory settlement is reached with the foreman, the grievance shall then be reported to the shop steward who shall put the same in writing, briefly stating the facts of the grievance, the Contract violations which he/she believes have occurred, and the relief sought and shall present the same to the Plant Superintendent, but only if he believes the same to be justified,

within three (3) working days of the foreman's answer in Step (1) above. If the shop steward and the Plant Superintendent shall endeavor to settle the grievance and the Plant Superintendent shall have five (5) working days after the conference with the shop steward to give his answer in writing.

Step 3

Appeal to Top Management

If the answer of the Plant Superintendent is not satisfactory and no agreement is reached at Step (2) above, an appeal may be filed by the Local Union to the Company President within three (3) working days of the Plant Superintendent's answer in Step (2). Within five (5) working days after filing such appeal, the President of the Local Union and the Company President shall meet and try to resolve the grievance. If they are unable to agree, the matter may be referred to arbitration in the following manner:

(a) Within five (5) working days from the date of the Company President's answer in Step (3) above, the President of the Local Union will serve a written demand for arbitration upon the President of the Company.

(b) The parties shall meet within ten (10) working days after the written demand for arbitration is received and select an arbitrator from a permanent panel of five (5) names selected by alternate strikes from a panel of thirty (30) names submitted by Federal Mediation and Conciliation. The parties shall place the names of these five (5) arbitrators in a hat and draw one name therefrom who shall serve as the arbitrator for the dispute, provided he can hear the same within thirty (30) days. If he cannot hear the case within thirty (30) days another name shall be drawn until an arbitrator is reached who can hear the case within those time limits. If none can hear the case within thirty (30) days the one who can hear the case the soonest shall be selected.

(c) The arbitrator shall convene the hearing and render a decision within thirty (30) days of the date of his selection, which shall be final and binding upon both parties; provided, however, the arbitrator shall have no power or authority to add to, subtract from, or modify any of the terms of this Agreement, decide any matter declared not to be a grievance by this Contract, and his opinion must be limited to the grievance outlined in the written demand for arbitration.

(d) Any arbitration award covering the subject of discipline or discharge shall be limited to thirty (30) working days or maximum back pay liability.

(e) The cost of the arbitrator and expenses in connection with the arbitration procedure shall be borne equally by the Company and the Union. However, the respective parties shall bear the expense in connection with the attendance of their witnesses or payment for their own representatives.

(f) There shall be no waiver of any steps of the procedure outlined above by either party. All notices or answers required herein shall be made in writing and delivered to the other party, all demands for arbitration shall be made by Certified Mail, Return Receipt Requested.

(g) No grievance will be filed on behalf of any employee, and no case proceed to arbitration for any employee who does not desire the same, or who informs the Company that so far as he is concerned no grievance exists. Upon settlement of any written grievance the parties hereto through their designated representatives will sign the settlement.

Section 2. There shall be no strike, work stoppage, slowdown or other interruption of work by the Union or the employees during the life of this Agreement, or a lockout on the part of the Company.

Section 3. Failure to the Union, or employees to take action within the time limits set forth above shall result in the matter

being dropped. Failure of the Company to take action within the time limits set forth shall result in the matter being automatically processed to the next step, unless the Union indicates it does not desire to further pursue the matter. Time limits at all steps may be extended by written mutual agreement. The processing of grievances and arbitrations shall be solely handled by the Local Union.

APPENDIX F

Pages 6-8 of Employer's Brief in Court of Appeals

(With "Employer" Substituted for "Respondent")

9. On February 3, 1977, Local 7 representatives Coryell and Eaton met with Employer's respresentatives Boswell and Willhouse and selected arbitrator Raymond R. Roberts to hear a grievance relating to seniority of employee Virginia Gladden. (Tr. 40, line 19 to Tr. 42, line 4).[8] Prior to this meeting, accord-

[8] The record is somewhat confusing as to the particular grievance involved. Although there was considerable testimony about grievance and arbitration and co[illegible]roceedings in 1975, Charging Party's counsel Souders admitte[illegible] the record (Tr. 30, lines 6-12) that "none of those eight [1[illegible] grievances involved *the grievance* in this case." There were only [illegible] grievances allegedly filed in 1976 (Tr. 30, line 24 to end of page). Those two grievances allegedly related to David Riley's dismissal and Virginia Gladden's loss of seniority. (Tr. 31, lines 1-3). The grievance relating to Virginia Gladden was allegedly filed on December 14, 1976 (Tr. 31, lines 4-5), but a copy of such grievance is not introduced as an exhibit in the record. Local 7 President Lundblade testified that after she filed the Gladden grievance she called [Employer's] President Boswell and then received a letter from him (G.C.Ex. 7), which asked for the person's name and for particulars as to the violation alleged. (Tr. 31, G.C.Ex. 7). Lundblade's letter of 20 Dec. 1976 (G.C.Ex. 8) was in response to that request. (Tr. 31). General Counsel's counsel Auslander explained to the Judge (Tr. 31, lines 24-25) as to Lundblade's letter of 20 Dec. 1976 (G.C.Ex. 8): "It's the grievance letter, it refers to the grievance that she had filed." At this point, the Judge indicated he was confused by the witness' earlier reference to the Riley discharge grievance (Tr. 31-32). It was after that when G.C. Ex. 8 was marked and received along with G.C.Ex. 7 (Tr. 33). G.C. Ex. 8 itself names Virginia Gladden as the grievant (G.C.Ex. 8, p. 2).

Other documents make clear that the selection of Arbitrator Roberts related only to the Virginia Gladden grievances. G.C.Ex. 9 is Employer's letter to Local 7 requesting a meeting to discuss this December 14 grievance. (Tr. 34). The meeting which was held, according to Lundblade, dealt solely with the Virginia Gladden grievance. (Tr. 35). The Virginia Gladden grievance is also the only one discussed in a subsequent meeting, as Lundblade testified. (Tr. 37, line 12 to Tr. 38, line 5). Boswell's letter of January 12, 1977, to Local 7 President Lundblade indicates the company has thoroughly

investigated the December 14 grievance and found it without basis and states the company is ready to arbitrate it if Local 7 wished. (G.C. Ex. 10, Tr. 38). Although the Judge had indicated confusion about the reference to the Riley discharge as being one alleged grievance and had inquired as to the preliminary grievance step discussions concerning that alleged grievance, and Counsel for General Counsel stated to the Judge, "Your Honor, I'm going to get into that right now" (Tr. 32), the only evidence presented about such grievance step discussions related exclusively to the Virginia Gladden grievance. (Tr. 32-39). G.C.Ex. 11 is a letter sent by Lundblade to Boswell on January 15, 1977, which requests arbitration of alleged grievances relating to David Riley and Virginia Gladden (Tr. 39-40) and G.C.Ex. 12 is Boswell's response of January 20, 1977, indicating the company would select an arbitrator for the December 14 grievance only. (Tr. 40). It was after this G.C.Ex. 12 letter that the meeting was held on February 3, and Raymond R. Roberts was selected as the arbitrator. (Tr. 40-41).

When Lundblade was cross-examined by Employer's counsel, she was asked specifically what grievance she was claiming Employer had refused to arbitrate (Tr. 59-60). At this point, she failed to even mention the Virginia Gladden grievance (Tr. 60), but mentioned the David Riley grievance as one filed in March (Tr. 60), and apparently referred to the 1975 grievances (Tr. 60), which her counsel had earlier admitted are not involved in this case (Tr. 30, line 24 to end of page). Asked if she had copies of the grievances she referred to, she said she did at home and her attorney did and the 1975 grievances were in Court. (Tr. 60). When Judge Ness inquired why Employer's counsel was concerned about which grievance was involved, counsel stated that only one grievance was involved (Tr. 61) and the Judge indicated he did not think it mattered whether one or more grievances were involved (Tr. 61).

Judge Ness indicated he was not concerned with the testimony relating to the 1975 grievances. (Tr. 72-73). "It's a legal conclusion for me to make but insofar as the testimony is concerned, why do we even have to go [into] what happened in '75 et cetera. I don't know why we have all this testimony from the witnesses, oral testimony, frankly. I did not know whether it was necessary but after these exhibits were introduced showing that the company did refuse and stating why, what's the issue other than a legal issue?" (Tr. 73, lines 12-19). Counsel for General Counsel agreed and the Judge then stated, "It looks like everyone is agreed," (Tr. 73) thereby foreclosing any cross-examination as to the direct examination testimony by Lundblade on those matters. (Tr. 72-74).

The correspondence between the parties and the arbitrator also shows that the Virginia Gladden grievance is the only one involved in the case for which arbitrator Roberts was selected. See particularly G.C.Ex. 16 and C.P.Ex. 7.

ing to Local 7 President Lundblade, Employer's President Boswell had requested her to give assurances that the limitation (against International Union participation in the processing of this grievance and arbitration) contained in the last sentence of the Arbitration clause, was being observed. (Tr. 36-37). Boswell had explained to Lundblade in these conversations that it was his intention that the arbitration be conducted in accordance with the limitation expressed in the last sentence of the Arbitration article. (Tr. 62)[9]

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[9] When Employer's counsel asked Lundblade to admit this, Charging Party's counsel Souders objected that the letter written by Boswell on February 3, 1977 (G.C.Ex. 13) speaks for itself and the Judge agreed. (Tr. 62) The Judge then asked Employer's counsel if the documents themselves did not really explain the positions of the parties, and Employer's counsel Jones stated, "if you ignore any testimony she [Lundblade] made about other statements of Mr. Boswell, I think the letters speak for themselves * * *" (Tr. 62), and at that point, the Judge stated he did not see why "we have to get into it with the witnesses about individual conversations, frankly, to me, I don't see much point in doing it to begin with. The letters speak for themselves, at the time the testimony went in, we did not have the letters but it strikes me that this correspondence clearly shows the position of the parties * * *" (Tr. 62-63). Lundblade was then asked one final question as to whether Boswell had made plain that the last sentence of the arbitration clause was what he was seeking to see that Local 7 was observing and Lundblade answered, "Yes * * *" (Tr. 63). She volunteered that Local 7 had been complying with that clause, and when Employer's counsel attempted to get her to admit that Boswell did not believe Local 7 was following that clause, the Judge refused to permit further cross-examination on the point indicating that it had already been covered, what type of affidavit was wanted. (Tr. 63) Lundblade did admit that Boswell did not believe the Amalgamated Fund was part of the funds of Local 7 (Tr. 63).

Employer was also precluded from cross-examining the International Union President Higdon about his knowledge that the Respondent was contending that Local 7 and the International were violating the last sentence of the Arbitration clause. (Tr. 86-87).

No. 78-1656

In the Supreme Court of the United States

OCTOBER TERM, 1978

INDEPENDENT STAVE COMPANY, DIVERSIFIED INDUSTRIES DIVISION, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 13-20) is reported at 591 F.2d 443. The Board's decision and order (Pet. App. 26-43) are reported at 233 N.L.R.B. No. 179.

JURISDICTION

The judgment of the court of appeals (Pet. App. 21-24) was entered on February 15, 1979. The petition for a writ certiorari was filed on May 1, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the Board properly found that an employer's unilateral modification of an arbitration provision in a collective bargaining agreement violated Sections 8(a)(5) and 8(a)(1) of the National Labor Relations Act.

STATEMENT

1. Petitioner ("the Company") has been a party to three successive three-year collective bargaining agreements with Coopers' International Union of North America, AFL-CIO ("the International") and its affiliated Local Union No. 7 ("Local 7") (Pet. App. 32). The last of these agreements, effective from November 4, 1974, through November 3, 1977, contained a grievance and arbitration clause which provided: "The processing of grievances and arbitrations shall be solely handled by the Local Union" (Pet. App. 33, 47).

In 1975 Local 7's President Lundblade filed eight grievances with Company President Boswell (Pet. App. 33). After Boswell stated on several occasions that there was no basis for the grievances and nothing to arbitrate, Local 7 filed an action in the United States District Court for the District of Missouri under Section 301 of the Labor Management Relations Act, 29 U.S.C. 185, to compel arbitration of the grievances (Pet. App. 33; Tr. 16, CPX 1).[1] The parties thereafter executed a partial settlement, agreeing to arbitrate five of the grievances (Pet. App. 33; Tr. 16-17, GCX 4).

One of these grievances went to arbitration in August 1976. Local 7 prevailed, and back pay was awarded to three employees (Pet. App. 33; Tr. 18-19, CPX 3). Local 7 was represented in the arbitration by a member of the law firm that also represents the International (Pet. App. 36; Tr. 18-19, 129-131). Local 7's attorneys' fees for the case

[1]"Tr." refers to the transcript of the unfair labor practice preceeding; "GCX." "RX" and "CPX" refer to the General Counsel's, the Company's, and the Charging Party's exhibits, respectively.

were paid from a "defense fund" held by the International union but funded by its affilated locals and maintained for their use (Pet. App. 36; Tr. 80-83, 131-133).

Subsequently, the Company refused to proceed to arbitration on two other grievances or to pay the back pay award (Pet. App. 33; Tr. 15, 20-21, 23-24). It filed a petition in a Missouri state court seeking a declaratory judgment that the International could not, under the collective bargaining agreement, furnish aid and assistance in Local 7's arbitrations (Pet. App. 33; RX 3). Local 7 then amended the complaint in its federal court action to request arbitration of the two other grievances and enforcement of the arbitrator's award (Pet. App. 33; Tr. 15-16, 23-28, CPX 3). Thereafter, the Company filed a suit in the United States District Court for the Western District of Kentucky seeking to enjoin the International from participating in the handling and processing of grievances (Pet. App. 33-34; RX 2).[2]

Late in 1976, Local 7 filed two additional grievances. After discussion, Local 7 and the Company agreed to arbitrate one of them (Pet. App. 34; Tr. 30-32, 35-39, GCX 10). On February 3, 1977, after representatives met to select an arbitrator, Company President Boswell wrote a letter to the arbitrator noting the contractual provision that the processing of grievances and arbitrations would be solely handled by the Local Union (Pet. App. 34-35; Tr. 40-42, GCX 13). He then stated that the purpose of the provision was to limit the number of "petty grievances aggravated and financed by the Coopers' International Union," that he had "proof"

[2]All three suits are pending.

that both Local 7 and the International had violated the provision, and that suits were pending against Local 7 and the International seeking relief and damages (Pet. App. 34-35; GCX 13). Boswell concluded his letter with the following demand (Pet. App. 34-35; GCX 13):

> We want the arbitration you will conduct to be strictly to the letter of the contract. To insure the arbitration is solely handled and financed by Local 7, I do not feel it is out of order to request those representing Local 7 and the officers of Local 7 to sign an affidavit stating the Coopers' International Union has not instructed, conferred, employed, paid or guaranteed payment, or in any direct or indirect way entered into the pursuit of this grievance. Also, that all the work and expenses occurring from the grievance and arbitration is born [*sic*] solely by Local 7.

The arbitrator responded by proposing a two-stage arbitration hearing, the first stage to consider the matters raised by the Company's letter and the second to consider the merits of the grievance (Pet. App. 35; GCX 17). Local 7 agreed to this proposal, but the Company rejected it and continued to demand the affidavits as a precondition to arbitration (Pet. App. 35; GCX 18, 19). The Company also denied the correctness of a statement by the arbitrator that the Company's position was "tantamount to [a] refusal to arbitrate," expressed doubt that it would get fair consideration at an arbitration hearing, and stated: "We welcome the NLRB to seek the facts of this matter" (GCX 20, 21).

2. The International and Local 7 then filed an unfair practice charge with the Board, alleging that the Company had violated Sections 8(a)(1) and 8(a)(5) of the

Act, 29 U.S.C. 158(a)(1) and 8(a)(5). The Board, adopting the decision of its administrative law judge, found that the Company violated Sections 8(a)(1) and 8(a)(5) by insisting on the affidavit from Local 7 as a condition to arbitration and thereby unilaterally modifying the collective bargaining agreement (Pet. App. 26-27, 40). The Board found that the contract did not preclude the Local from "consult[ing] or * * * confer[ring] with the International on the advisability of filing a grievance or how best to process a grievance * * *" (*id.* at 37). The Board also found that the International was not bearing the expense of the Local's grievance and arbitration proceeding (*id.* at 36). It therefore concluded that the limitations to arbitration reflected by the Company's demand constituted a modification of the contract.

The Board ordered the Company, *inter alia*, to withdraw its insistence on the affidavit as a condition to arbitration (Pet. App. 41).

3. The court of appeals concluded that the "Board's finding that [the Company] made a unilateral mid-term change in the collective bargaining agreement * * * by refusing to arbitrate unless the disputed affidavit was signed is supported by substantial evidence on the record as a whole" (Pet. App. 17). It therefore enforced the Board's order, except in one respect not material here.[3]

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[3]The court held that, because the evidence supported a finding that the Company had refused to bargain only with respect to the arbitration clause, it would not enforce a broad bargaining order (Pet. App. 20).

The court agreed with the Board that the affidavit on which the Company insisted before proceeding to arbitration went beyond the requirements of the arbitration clause. The court stated:

> The clause is quite clear. It simply provides that grievances submitted to arbitration "shall be solely handled by the local union." It does not prohibit the local from being advised or counseled by the International Union with respect to handling grievances in arbitration. It does not prohibit the International Union from advising the local as to the merits of grievances, it does not specifically prohibit the local from employing counsel to assist it in preparing and submitting grievances to arbitration, and it does not specifically bar the International Union from contributing to the expense incurred in processing grievances through arbitration.

Pet. App. 18.[4]

The court also rejected the Company's contention that a breach of an agreement to arbitrate is not within the Board's jurisdiction but is a matter solely for the courts under Section 301 of the Labor Management Relations Act, 29 U.S.C. 185. The court stated (Pet. App. 20):

> Here, the union agreed to permit the arbiter to decide precisely what was meant by the disputed words and the employer refused. Moreover, it is clear that the Board has the power to interpret collective bargaining agreements pursuant to the enforcement of statutory rights. *N.L.R.B. v. C & C Plywood Corp.*, 385 U.S. 421, 424-430 (1967); *N.L.R.B. v. Huttig Sash & Door Co.*, [377 F. 2d 964, 968-970 (8th Cir. 1967)]. Similarly, under § 10(a) of the Act, the Board may "proscribe conduct which is an unfair labor practice even though it is also a breach of contract remediable as such by arbitration and in the courts." *N.L.R.B. v. Strong*, 393 U.S. 357, 361 (1969).

[4]The court also concluded that the Board's finding that the defense fund "was not a fund of the International Union but was a fund held by the International Union for the benefit of the local unions and their members * * * has substantial support in the record" (Pet. App. 18).

ARGUMENT

Petitioner contends (Pet. 8-11) that a breach of an arbitration provision in a collective bargaining agreement is not an unfair labor practice but may be redressed by courts only in a suit to enforce the agreement under Section 301 of the Labor Management Relations Act. The court of appeals properly rejected this contention.

It is true that not every breach of a collective bargaining agreement constitutes an unfair labor practice within the Board's jurisdiction. See, *e.g.*, *Allied Chemical & Alkali Workers of America* v. *Pittsburgh Plate Glass Co.*, 404 U.S. 157, 183-188 (1971). It is also true that many actions that might violate a collective bargaining agreement are unfair labor practices. There is thus a substantial overlap between the Board's unfair labor practice jurisdiction and the jurisdiction of courts under Section 301. Thus, for example, if an employer fired an employee because of the employee's union activities, that would be a clear unfair labor practice although it might also be an actionable breach of a collective bargaining agreement. See, *e.g.*, *Allied Chemical & Alkali Workers of America, supra; NLRB* v. *Strong*, 393 U.S. 357, 361-362 (1969); *Vaca* v. *Sipes*, 386 U.S. 171, 179-180 (1967); *Smith* v. *Evening News Association*, 371 U.S. 195, 197-198 (1962).

Section 8(a)(5) makes it an unfair labor practice for an employer "to refuse to bargain collectively with the representatives of his employees * * *," and Section 8(d) makes it a breach of that duty to bargain collectively for an employer, during the term of a collective bargaining agreement, to "terminate or modify such contract," except on certain conditions not pertinent here. In determining whether an employer's conduct merely constitutes a breach of the agreement subject to the sole jurisdiction of the courts under Section 301 or whether it also constitutes a termination or modification of the agreement, which is an unfair labor practice under Section 8(a)(5), the Board and the courts have generally considered whether the conduct represents isolated and unrelated actions on the part of the employer or whether, on the other hand, it represents a general change in a basic term or condition of employment fixed by the agreement. See *NLRB* v. *Los Angeles Yuma Freight Lines*, 446 F. 2d 210, 214 (9th Cir. 1971); *Amalgamated Clothing Workers of America* v. *NLRB*, 343 F. 2d 329, 331-332 (D.C. Cir. 1965); *C&S Industries, Inc.*, 158 N.L.R.B. 454, 458-459 (1966).[5] Thus, if an employer negotiates and signs an agreement providing for a wage of $5 per hour for his employees, and the next day he announces that he will pay them only $4 per hour, that would be not only a breach of the contract but also a blatant mid-term modification of the

[5]In *Allied Chemical & Alkali Workers of America, supra*, this Court established another basis for distinguishing between contract breaches that are subject only to court jurisdiction under Section 301 and those that are also unfair labor practices under Sections 8(a)(5) and 8(d); namely, whether the matter is one which is a mandatory subject of bargaining or only a permissive subject of bargaining. 404 U.S. at 187-188. Grievance procedures are plainly mandatory subjects of bargaining, and petitioner does not contend otherwise. *Bethlehem Steel Co.*, 136 N.L.R.B. 1500, 1502 (1962), enf. in rel. part sub nom. *Industrial Union of Marine Workers* v. *NLRB*, 320 F. 2d 615 (3d Cir. 1963); *NLRB* v. *Ross Gear & Tool Co.*, 158 F. 2d 607, 610 (7th Cir. 1974).

contract and thus a violation of his obligation to bargain collectively and in good faith. And in determining whether the employer's conduct constitutes a mid-term modification of the agreement in violation of Sections 8(a)(5) and 8(d), the Board has jurisdiction to construe the agreement. See *NLRB* v. *Strong, supra*, 393 U.S. at 361; cf. *NLRB* v. *C&C Plywood Corp.*, 385 U.S. 421 (1967).

In this case the court of appeals correctly affirmed the Board's determination that petitioner's conduct constituted a mid-term modification of the agreement and not simply an isolated breach of contract. Petitioner clearly stated its position that it would not process any grievances unless the union satisfied a specific condition. The Board found, and the Court agreed, that the condition was not provided for in the agreement and thus constituted a modification of it. That finding was correct. In any event there is no reason for this Court's review of a question that turns on the meaning of a provision in a particular collective bargaining agreement, particularly in view of petitioner's original refusal to submit the issue to the arbitrator and its indication that it would "welcome" the Board's resolution of the matter.[6]

[6]Contrary to petitioner's claim (Pet. 8-9), the decision below does not conflict with decisions of other circuits or with earlier decisions of the Board. The cases cited by petitioner (Pet. 8 nn. 4-8) involved either isolated breaches of contract (*NLRB* v. *Los Angeles Yuma Freight Lines, supra; Almalgamated Clothing Workers of America, supra; Central Rufina*, 161 N.L.R.B. 696, 700 (1966); *Textron Puerto Rico*, 107 N.L.R.B. 583 (1953)) or conduct that was not found to violate the agreement. *Danner Press, Inc.* v. *NLRB*, 374 F. 2d 230 (6th Cir. 1967). Cf. *National Dairy Products Corp.*, 126 N.L.R.B. 434 (1960); *United Telephone Co. of the West*, 112 N.L.R.B. 779 (1955), in which the Board declined to decide whether the conduct constituted a breach of the collective bargaining agreement.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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